Supreme Appellate Jurisdiction.

A SPEECH

DELIVERED BY

THE RIGHT HON. LORD O'HAGAN;

IN THE HOUSE OF LORDS;

ON THE

11TH OF JUNE, 1874.

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NOTICE.

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Lord Selborne's Speech on Lord Redesdale's Motion in the House of Lords (June 11, 1874) having been lately circulated, it has been thought desirable to republish the Speech of Lord O'Hagan, on the same occasion.

A SPEECH,

&c.

LORD O'HAGAN :—My Lords, no one can fail to see that the task undertaken by the noble Lord, whose motion occupies the House, is full of difficulty. He seeks to reverse a recent decision of your Lordships,—which was affirmed by the House of Commons, chiefly because it had been before pronounced by you,—relating to a question on which you are more likely to be made adverse to him because it touches your own privileges, and is calculated, perhaps, on that account, to induce a judgment too unfavourable to yourselves.

But, my Lords, the question does not regard you only. The loss or gain is not merely personal to you. You hold a trust for the good of the realm, which has come down to you, as a great inheritance, through many generations of wise and famous men. If you can no longer fulfil its obligations with advantage to the administration of justice, you ought, at once, to abandon it; but its voluntary abandonment should, at least, be justified by plain and coercive reasons.

I confess, with my noble and learned friend, the Lord Justice Clerk, that I scarcely expected to see this controversy effectively renewed. But it has had a vigorous revival. Public opinion has largely declared itself, in various districts of the Empire, for the maintenance of your ancient jurisdiction. The discussion is raised again, in new circumstances and under new conditions, by a member of your Lordships' House, who possesses the highest personal and hereditary claims to your most respectful consideration; and I have felt bound to give the matter again my best attention, and to reach, upon its merits, the soundest conclusion I can form.

I have said so much, perhaps unnecessarily, as my noble and learned friend on the Woolsack seemed to think, when I last addressed your Lordships on this topic, that there was something in the nature of a personal estoppel against my argument, because, having been Lord Chancellor of Ireland under the late Government, I had given, as he said, the weight of my authority to the opposite view.

My Lords, I may be allowed to submit, that neither my noble and learned friend, the Lord Justice Clerk, nor I, nor the great professions in Scotland and Ireland, whose opinions, in this matter, we approve, should be precluded from expressing those opinions by anything which has occurred. The Bill of 1873 touched England

only, and Ireland and Scotland were not active in opposing its progress. For myself, I was judicially engaged elsewhere, during the brief discussions it encountered; and I took no part in them. I did not vote for it: I was not present at the passing of it; and, if I had been, my adverse interference would have been an intrusion, if it had not been, under the circumstances, an impossibility.

I pray your Lordships, also, to observe that the Bill now before the House is not the Bill of 1873. They are entirely different,—as has been shown by my noble and learned friend (Lord Penzance) who seconded the motion,—in a point which vitally affects the argument on the issue before the House; and you are free to reconsider your former decision, and modify or reverse it, without any impeachment of inconsistency. The Bill of 1873 gave one appeal; the Bill of 1874, I think most properly, has given two. And the accumulation of business, which might have overwhelmed a single Appellate Court and made the disposal of it by this House impossible, will be so reduced, by the winnowing process of the intermediate tribunal, as to do away with any such impossibility.

And now, Ireland and Scotland urge their common claim, not to have a Court of Ultimate Appeal distinct from that of England, but to induce England to retain her own time-honoured jurisdiction, which they both prefer to any new invention. The Bill is changed, I think essentially, as

to the double appeal; and on a measure so altered, —on a case urged by those whom, for the first time, it aims to affect, and who, assuredly, have a legitimate right to be heard against it,— on a motion made by an English Peer, and sustained, as I am told, by a mass of judicial and professional sentiment in England,—I feel not only at liberty, but bound, with a free and open mind, to form and to express my honest judgment.

My Lords, the jurisdiction which the noble Lord asks you to preserve is as old as the Constitution, and has ever been held an essential part of it. It has been maintained for many ages, through all the changes of governments and all the revolutions of opinion; and, so far as we have any trustworthy evidence, it is at this moment as respected and as popular, as at any period since it grew into being with the very foundations of the Common Law.

The description of its characteristics by Lord Coke is as true now as it was three centuries ago. He says:—"Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima." And if this be so, may we not fairly ask what is the justification for its overthrow? By what authority has it been denounced? On what inquiry has it been found unworthy of existence? What trial has been made to correct its errors and supply its shortcomings, before its condemna-

tion to extinction? The burden of proof is surely on those who assail an institution so venerable in its antiquity and so great in its traditions; and that proof should be strong and clear, to overbear the presumption in its favour which those things create. But I venture to say that no change so momentous was ever proposed on lighter grounds or accomplished with less deliberation.

Various inquiries have been instituted by your Lordships as to your Appellate Jurisdiction, and not one of them has issued in a recommendation to abolish it. They all contemplated its reform, and not its destruction; which, for England, was achieved, after very slight debate, in a single effort, by the Act of 1873. There were such inquiries in 1813 and 1823, on which I need not now bestow attention. But the inquiry of 1856, before a Select Committee of this House,—conducted as it was by Peers of the highest ability and distinction, beyond all others qualified to pronounce on such a question, and aided by the testimony of men of remarkable professional experience and attainments,—may surely claim the greatest consideration. A Committee composed of such persons as Lord Lyndhurst, Lord St. Leonards, Lord Brougham, Lord Cranworth, Lord Campbell, Lord Aberdeen, Lord Lansdowne, Lord Ellenborough, and Lord Elgin, has rarely been matched in either House of Parliament. The witnesses were of the highest and

most instructed class, such as Lord Westbury, and my friend, Sir Joseph Napier, afterwards Lord Chancellor of Ireland; and that Committee unanimously expressed their entire concurrence with the general opinion of those witnesses, as to the expediency of retaining the Appellate Jurisdiction of this House.

It is impossible to imagine a pronouncement of greater conclusiveness. Statesmen and judges, amongst the greatest and the wisest whom England has produced, united in declaring that there was no need of the change which has been wrought. And you are merely asked to affirm their judgment —which no subsequent circumstances have affected, which no subsequent decision has overruled, which, if it was correct in 1856, is equally correct in 1874. The Judicature Commissioners had not the question of your Lordships' jurisdiction referred to them; and the Committee of this House, in 1872, on which I had the honour to serve, did not advise extinction of the tribunal, but that it should be supplemented and strengthened by extraneous aid. This was the last inquiry on the subject, and this the last authoritative counsel given to your Lordships before you were asked to vote for the change of 1873. So that, if I am not mistaken, the judgment of 1856 remains undisturbed; and there is nothing to bring it into question.

And is it too much to ask that that solemn

judgment should not lightly be set at nought? Why should it be? Opinion sometimes unduly compels change. It is sometimes too strong for argument,—too masterful for rational resistance. It has its gusts of passion, which obliterate old landmarks, sweep down cherished institutions, and compel reluctant observance of its imperious mandates. But, in this case, opinion and authority go together.

There has been much criticism of the House of Lords as an Appellate Court. Its actual deficiencies have been frequently exposed, and there have been very many and very useful suggestions for its reformation. But I am not aware that England has uttered any outcry against its continuance. I have heard of no popular or professional demand that it should be done away. My noble and learned friend on the Woolsack has read the resolutions of 1873 as indicating the opinion of Ireland; but I must remind him that, in 1874, the Irish Bar have unanimously and repeatedly declared their preference for this House as the Final Court of Appeal, and that the representatives of the Irish solicitors have petitioned your Lordships, affirming, for themselves, that preference. They all recognize the necessity of having the same final Court for the three kingdoms; but they all desire that it may be what it is, and nothing else. In 1873, they did not meddle with the provisions of a measure

not immediately affecting them. In 1874, their declarations are strong and unequivocal.

Scotland is of the same opinion. The Judges are unanimous: the writers to the signet are unanimous; and, though there appear to be differences elsewhere, my noble and learned friend behind me has demonstrated that the feeling of Scotland is effectively with this motion.

Is, then, the pronounced judgment of two kingdoms to go for nothing? Ought it to receive no respect and command no attention? My noble and learned friend has said that the opinion of the professions is not the opinion of the people, and that this can only be known through their legitimate representatives. But, on a question of this description, who are to determine? By whose judgment should the general sentiment be guided? Surely, the men who alone have opportunity of observing, and have at once a duty and an interest to observe, the conduct of a tribunal, are the true exponents of opinion about it. The masses know nothing, and can know nothing, save through their report; and when they combine for praise or blame on such a subject, the multitude must follow them. If the working of any judicial institution has their approval, must it not be held of the highest value? The mode of the administration of the law is often as important as the law itself, and when those who administer it command the confidence of the advocate and

the suitor, the tribunals they control are beyond impeachment.

As to the matter before us, the instructed opinion of Ireland and Scotland—and of England also, as I am assured, to a very large extent—whilst it desires reform, protests against destruction; and if the abolition of the judicial functions of this House be permanently accomplished, it will occur, not in response to any public complaint, or in obedience to any public condemnation, or in satisfaction of any public desire, but against the remonstrance and in spite of the opposition of the classes in, at least, two of the three kingdoms, who are most qualified to speak, and best entitled to be heard, on a proposal vitally affecting their profession, their country and themselves.

Well, then, my Lords, if the retention of your jurisdiction be approved by the highest authorities in the Law and in the State; if there be no adverse finding by Committee or Commission; if public opinion be in its favour—why should you cast away a privilege which you hold, not so much for your own honour, as for the benefit of the nations which beg you to retain it? What assurance have you that the thing to be substituted will be better than the thing to be destroyed? How has it been demonstrated that you cannot combine continuous judicial action, ripe intellect, deep learning and wide experience, with the *prestige* and the dignity incommunicably attached to a

tribunal, so venerable in age and so imposing in authority? What are the conclusive reasons which should compel you to abandon your position in the judicial system of the Empire? Why should you precipitate an organic change, which will shatter one of the stoutest buttresses of your constitutional power?

Consider for a moment the objections which have been raised against the existing arrangements; and whether, if they be tenable, they be, also, irremovable? Those objections, as stated by the Committee of 1856, and since repeatedly urged in discussion, represent that the attendance of the Law Lords is uncertain and fluctuating, the adequate number difficult of maintenance, and the period of the sittings limited by the duration of Parliament.

Beyond doubt, the interest of the suitor is primarily to be regarded; and it is the first duty of Parliament to obtain for him the best available tribunal. To this object should be subordinated all considerations of political convenience and class privilege; and if these things cannot be made plainly to concur with the effective administration of justice, they must be entirely disregarded.

But the objections seem to me removable, and by the simplest means. The attendance of the Law Lords is, to some extent, occasional and uncertain, although I believe it was never less so

than it has been for a long time past. But the Committee of 1856, and the Committee of 1872, suggested a simple remedy, which should, at least, have been tried before the evil was pronounced incurable. The Committee of 1856 proposed the appointment of Deputy Speakers of the House, who might be judicial persons of the highest class; and who would always, with the Lord Chancellor, constitute a permanent Court, sitting along with the ordinary Law Lords. The Committee of 1872 gave somewhat similar advice as to the association of salaried Judges with the legal members of the House; and either of these suggestions, if successfully carried out, would have met the main difficulty, not existing, but possible to arise, in the actual state of things. Then, as to the cessation of sittings prematurely, the Committee of 1856 recommended that the House should be authorized by statute to have its Judicial Committees continued in Vacation, and for this recommendation they had the authority of Lord Hale in his book on the Appellate Jurisdiction. No one can doubt the power of Parliament to adopt such a course, and, by it, that difficulty might have been removed.

But further, we have been told—and this is the most common and popular argument against your Lordships' jurisdiction—that it is a "sham" and an unreality, because the Appellate Tribunal is composed only of legal Peers, and not of the

majority of your Lordships. Precisely the same objection would have applied at any period of your long history. Your predecessors always acted according to the judgment of those who were learned in the law. Lord Hale's treatise demonstrates this, in many conclusive passages. He says:—"The Judges have been always consulted withal, and their opinions held so sacred, that the Lords have ever conformed their judgments thereunto, unless in cases where all the Judges were parties to the former judgment, as in the case of ship money." And, again, of the Judges, he says:—"Their opinions have always been the rules whereby the Lords do, and should, proceed in matters of law, especially between party and party." And he seems to show the way out of the present difficulty by ancient precedent, when he speaks of the writs,—"By which a certain select number of the Lords with the Judges were commissioned by the King to examine, hear, and determine errors in judgments and decisions." The rules of action indicated in these passages have ever governed the judicial conduct of this House, and it seems to me a mistake to suppose, as was suggested by my noble and learned friend (Lord Hatherley), that the O'Connell case established any new practice, or involved any novel abandonment of jurisdiction. The Appellate Tribunal is as substantial a reality at this moment as it has been at any time since

it came into existence, and the suggestions to which I have referred, and which have been repeatedly made without effect, would, if adopted, in my judgment, give it vigour, constancy, and permanence, while preserving the peculiar attributes which have so largely won for it the attachment and trust of the community.

The objections we have heard, though formidable in seeming, are not fatal in fact. They may be encountered whilst we stand within the historical lines of the Constitution, adapting ancient principles to modern needs; and they do not warrant the ruin of an institution which, by their removal, we shall be enabled to reform. If it be possible at once to save and to amend, are we not bound to do so?

Can any one doubt the value of uniting the legislative and the judicial functions of your Lordships' House? Does not their exercise work a reciprocity of advantage which should not be wantonly relinquished? May not your legislation derive clearness and precision from the trained action of legal minds; and will not those minds be enlarged and enlightened, for the purpose of decision, by contact with the work of statesmanship, and familiarity with the great social and political questions which occupy the intelligence of the world? And why should the final judgment in the Court of last resort be deprived, if it be not clearly necessary, of the impressiveness

and the respect with which it has been clothed, from connection with the exalted position and the proud memories of this great Assembly?

My Lords, you may not be convinced by the arguments which I and those who think with me deem it our duty to submit to you. You may answer—"*Jacta alea est;*" and your decision may be irreversible. If it be so, I shall strive to hope the best; but I shall lament that decision, alike in the interest of justice and of legislation.